In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 361

L. R. JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The relevant facts of the present case are set forth in the opinion of the Court of Appeals for the Ninth Circuit and in the petition for a writ of certiorari, which was timely filed.

1. The government does not believe that there is a square conflict among the courts of appeals on the deductibility of a widow's allowance such as was involved in this case. Rejecting the government's position that there can be no marital deduction for an award of a widow's allowance which, *at the time of the decedent's death*, was contingent upon the widow's survival or failure to remarry to the time of award, the Fifth Circuit has held that the widow's allowance

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should be considered *as of the time it is awarded* and that it is deductible if it is then a lump-sum payment subject to no further contingencies. *United States* v. *First National Bank and Trust Co. of Augusta*, 297 F. 2d 312. The Fifth Circuit neither held nor suggested, however, that the marital deduction would be available if some part of the allowance was, *at the date it was awarded*, still subject to such contingencies as the widow's death or remarriage. It carefully distinguished such cases involving a contingent right to periodic payments as *United States* v. *Quivey*, 292 F. 2d 252 (C.A. 8) and *Cunha's Estate* v. *Commissioner of Internal Revenue*, 279 F. 2d 292 (C.A. 9), from a case like that before it involving a right to a lump-sum payment which is absolute and subject to no contingencies once it has been awarded.

In the present case the Ninth Circuit held that it need not determine whether the deductibility of a widow's allowance should be decided as of the time of the decedent's death or as of the time of the award; for, even as of the time of the award, some part of the allowance in this case was subject to termination in the event of the widow's death or remarriage. The court below carefully refrained from passing on the deductibility of a lump-sum allowance which, at the time it was awarded, was subject to no contingencies but which, at the time of the spouse's death, had been subject to the contingencies of the widow's death or remarriage before the award was made.

We therefore believe that the Fifth Circuit has left itself entirely free to agree with the Ninth Circuit on the facts of a case such as this and the Ninth Cir-

cuit has, in this case, left itself equally free to follow the Fifth Circuit's decision in the *Bank of Augusta* case. There is accordingly no square conflict between the circuits.

2. The issue of the deductibility of widow's allowances under the marital deduction provisions of the Federal estate tax recurs frequently. The decisions of the lower courts are, if not in conflict, far from consistent in rationale and approach. As in the present case, exceedingly narrow distinctions have been made to reconcile the decisions. There is, moreover, a pervasive disagreement as to whether the deductibility of a widow's allowance should be determined as of "the instant of the decedent's death" (*Cunha's Estate* v. *Commissioner of Internal Revenue*, 279 F. 2d 292, 297) or "at the time of the court award" (*United States* v. *First National Bank of Augusta*, 297 F. 2d 312, 316) and most cases involving the deductibility of a widow's allowance can, if not must, turn on the resolution of this disagreement. For these reasons the government does not oppose the granting of the petition in this case, even though there is no square conflict among the courts of appeals.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

SEPTEMBER 1963.

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